



IPC COMMENTS FOR ICANN ON EXPRESSIONS OF INTEREST

The Intellectual Property Constituency (“IPC”) is a constituency of the GNSO and represents the full range of trademark and other intellectual property interests relating to the DNS. IPC members are international, regional and national intellectual property organizations from around the world, corporate entities with intellectual property interests (often as owners of intellectual property), and individuals with an interest in intellectual property matters. The IPC appreciates this opportunity to provide its comments on the Expression of Interest/Pre-registration Model posted for public comment on December 18, 2009 (“EOI”).

Point of Order

Before providing comments on the substance of the EOI proposal, the IPC feels it is incumbent to raise a point of order regarding a disturbing lack of process in the development, consideration and possible adoption of the EOI.

Specifically, the ICANN Board approved development of the EOI model after a process in which any community input not received within a 16-day public comment window was excluded. See ICANN EOI Model paper, at 4 (<http://www.icann.org/en/topics/new-gtlds/eoi-model-18dec09-en.pdf>) (“the Board could not take all the comment into account before discussion”). Concerns have already been raised by IPC members and other commenters about this procedure. See, e.g., <http://forum.icann.org/lists/eoi-new-gtlds/msg00035.html> (Comment of Coalition for Online Accountability); <http://forum.icann.org/lists/eoi-new-gtlds/msg00083.html> (comment of Microsoft Corporation); <http://forum.icann.org/lists/eoi-new-gtlds/msg00036.html> (comment of INTA Internet Committee). IPC shares these concerns, which are compounded by the Board’s stated intention to consider a proposed “EOI process model” for approval at its meeting February 4, only a week after this public comment period ends. See <http://www.icann.org/en/minutes/prelim-report-09dec09-en.htm>. It seems inconceivable that this short time period provides enough time for the staff to digest and summarize all public comment, identify possible modifications to the model based on public comment, and present the Board with the summary and proposed modifications, and for the Board to carefully review the summary and proposed modifications, and engage in reasoned deliberations. The ICANN Board should not vote on an EOI model at its February 4 meeting so that it has sufficient time to give the public comments the consideration they deserve.

Substantive Comments

In its comments to version one of the Draft Applicant Guidebook (“DAG”), the IPC stated:

*[The] IPC recognizes that the introduction of new gTLDs may offer opportunities for innovation, competition, and public benefit, especially in the IDN space, where there is likely to be unmet demand among Internet users whose languages are incompatible with the ASCII script used by all gTLDs to date. It seems likely, however, that in the new gTLD launch outlined in the DAG, these opportunities will be swamped by unproductive uses of the name space that present significant threats to intellectual property rights, and that also threaten to harm consumers through the confusion generated by intellectual property infringement in the DNS. One goal of the new TLD procedure should be to minimize this adverse impact. While the DAG reflects some efforts to do so, **much more is needed before there can be a basis for confidence in a positive outcome of this initiative.***

IPC Comments dated December 15, 2008 at p. 2 posted at <http://forum.icann.org/lists/gtld-guide/docns6Oa2K2zV.doc> (emphasis added).

After reviewing two subsequent drafts of the DAG and participating in the IRT and the STI, this remains our position. Accordingly, the above-referenced statement also informs our position on the proposed EOI process. While some members of the IPC acknowledge some of the proposed benefits that an EOI process might bring to ICANN as it is gearing up to run the proposed launch of new gTLDs (e.g., assisting ICANN in matching resources to demand), the IPC remains concerned about ICANN proceeding with another step toward implementation without first addressing outstanding issues which we believe include, but are not limited to, the five overarching issues articulated by ICANN staff.

While some members of the IPC feel that the EOI as proposed could allow “.brand” applicants to obtain a better understanding of whether they face any competing applications, the IPC concludes that the EOI as currently proposed by ICANN offers insufficient advantages to either potential “.brand” applicants or the wider community of trade mark owners. For this reason, the IPC strongly recommends that ICANN consider the following points:

I. Resolution of outstanding issues

Even the IPC members who feel that the proposed EOI process may have some potential benefit, do not think that the process can be opened until there is agreement in the ICANN community, including the GAC and especially the GNSO, that the overarching issues identified by ICANN Staff during the DAG process have been resolved.

These issues include (but are not limited to):

- Rights Protection: it is remarkable to our members that the EOI is even being considered prior to ICANN presenting the final set of implementation recommendations for the protection of the rights of others;

- The other overarching issues: The Economic impact of the new gTLDs, Malicious Conduct, Security & Stability (root scaling); and vertical integration
- The Objection process;
- Means of resolving string contention; and
- Details of the costs and discounts involved in applying.

II. Need for restrictions to prevent speculation/gaming of EOI process

The IPC believes it is incumbent upon ICANN to develop restrictions on the ability of EOI participants to transfer an EOI application. Without such restrictions, the IPC believes that there is a considerable risk that speculators will game the EOI process by creating a new form of “domain name tasting”. The IPC believes that the current DNS market place proves that it is very likely that speculators would create a speculators’ market in which legitimate rights owners feel it necessary to participate in the EOI because they believe they have no choice but to “buy” a TLD string application rather than face the risk and uncertainty of trying to oppose in later stages of the process, particularly when the objection process is unproven and not yet finalized. Accordingly, any restrictions on transfer will not only need to cover “assignment” of EOI applications, but also “change of control” for EOI applicants.

III. Confirmation of timelines

In order to facilitate the appropriate protection of third party rights, the IPC believes that the time between the launch of the proposed EOI process and the opening of the gTLD Applications process needs to be a minimum of three months and a maximum of six months.

The IPC believes that brand owners will need sufficient time in order to develop a strategy where “their” character string has been indicated by one or more applicants.

IV. Communications Campaign

The communications campaign promoting the EOI process must run for at least four months before the EOI opens. Potential applicants need at least this much time in order to properly consider the risks and rewards of applying within their organizations, to calculate the resource implications and to prepare business plans and obtain budgets. Moreover, without a robust and adequately long communication period, ICANN runs the risk that the only participants in the proposed EOI process will be so-called “ICANN” insiders, thereby prejudicing the broader stakeholder community.

V. Publication of applicants and character strings

The IPC does not object to the publication of a list setting out the character strings for which EOI applications are received. That said, however, the IPC does not believe that an EOI application should create any rights or entitlements for EOI applicants. Simply put, the IPC believes that non-EOI participants should be able to file applications in the first round as well as any subsequent rounds. Such a procedure will ensure that any gTLD string eventually allocated by ICANN goes to the

best possible applicant, rather than the first applicant to file (especially in an allocation system that remains so ill-defined).¹

VII. The EOI should not be taken as demonstrating demand for new gTLDs

The IPC strongly feels that it is entirely possible that many parties may feel compelled to apply under the proposed EOI process in order to have the maximum number of options open to them as they consider the impact the new gTLD program on their existing or proposed business model.

Given this reality, the IPC does not believe ICANN can legitimately use the number of EOI applications it might receive to demonstrate that there is economic demand for new gTLDs. Doing so makes the entire process flawed by circular logic. Because it is very possible that speculators will form the majority of applicants and many other applicants will surely file just to preserve their range of options, the economic case for new gTLDs needs to be proven by considering the needs and concerns of all Internet stakeholders and not predicated on information provided through a system geared toward creating “false positives” regarding the demand for new gTLDs.

VII. Other answers to the questions raised specifically by ICANN

ICANN asks: What information should be collected from EOI participants?

The IPC would like to see an additional category such as “Private Brand Registry” for trade mark owners who are applying whose registries will not be open to the general public. This information will enable ICANN to qualify the expertise/resourcing that it will require in evaluating new gTLDs.

CONCLUSION

The IPC continues to have grave concerns regarding ICANN’s plan to introduce an unlimited number of new gTLD extensions without having adopted an implementation plan that includes effective rights protection mechanisms to thwart trademark abuses. Accordingly, we reiterate our call for ICANN to resolve all the outstanding issues **prior to** opening any EOI process. Furthermore, it is our hope that ICANN will act upon our recommendations regarding the proposed EOI process and make the necessary adjustments to ensure a balanced and effective mechanism designed with the protections required to thwart gaming of the system **BEFORE** the EOI is launched.

¹ We note that the French government has proposed a modification to the EOI concept that would accommodate this concern. See <http://forum.icann.org/lists/eoi-new-gtlds/msg00073.html>.